Upton & Hatfield LLP
ATTORNEYS AT LAW

Concord Office
10 Centre Street
PO Box 1090
Concord, NH
03302-1090
603-224-7791
1-800-640-7790
Fax 603-224-0320

Attorneys At Law
James F. Raymond
Barton L. Mayer
Charles W. Grau
Heather M. Burns
Lauren Simon Irwin
Matthew R. Serge
Michael S. McGrath*
Marilyn Billings McNamara
Jeanne S. Saffan*
Lisa M. Hall
Kimberly A.W. Peaslee***
Sandra H. Kenney**
Michael P. Courtney*

Of Counsel
Robert Upton, II
Gary B. Richardson
John F. Teague
Bridget C. Ferns

Hillsborough Office
8 School Street
PO Box 13
Hillsborough, NH
03244-0013
603-464-5578
1-800-672-1326
Fax 603-464-3269

Attorneys At Law
Steven J. Venezia*

Of Counsel
Douglas S. Hatfield

Portsmouth Office
159 Middle Street
Portsmouth, NH 03801
603-436-7046
1-877-436-6206
Fax 603-369-4645

Attorneys At Law
Russell F. Hilliard
Justin C. Richardson

www.uptonhatfield.com
law@uptonhatfield.com

*Also admitted in MA
**Also admitted in MA & NY
***Admitted only in DC, ME
MA, US Patent/Trademark

Please respond to the Portsmouth office

June 26, 2015

Thomas S. Burack, Chairman
Site Evaluation Committee
NH Department of Environmental Services
29 Hazen Drive
Concord, NH 03302-0095

Re: Docket No. 2014-05
Petition of Antrim Wind Energy

Dear Chairman Burack:

Enclosed please find an original and 10 copies of *Memorandum of Law in Support of Jurisdiction.*

If you have any questions, please contact me.

Very truly yours,

Justin C. Richardson
jrichardson@uptonhatfield.com

JCR/sem
Enclosure(s)
cc: Service List (w/ enclosure)

BEFORE THE STATE OF NEW HAMPSHIRE

SITE EVALUATION COMMITTEE

Petitions of Antrim Wind, LLC and the Town of Antrim

NHSEC No. 2014-05

MEMORANDUM OF LAW IN SUPPORT OF JURISDICTION

NOW COMES the Town of Antrim, by and through Upton & Hatfield, LLP, and offers this *Memorandum of Law in Support of Jurisdiction* as follows:

I. ANTRIM'S PETITION FOR JURISDICTION UNDER RSA 162-H

On November 6, 2014, the Town of Antrim's Board of Selectmen petitioned the Site Evaluation Committee ("Committee") to assert jurisdiction over Antrim Wind, LLC's revised proposal to construct a revised 28.8 MW wind energy facility pursuant to RSA 162-H:2, XI (c). On November 25, 2014, Antrim Wind, LLC, as the applicant, petitioned pursuant to RSA 162-H:2, XI (d). On December 8, 2014, over one hundred Antrim residents petitioned the Committee to assert jurisdiction pursuant to RSA 162-H:2, XI (a).[1]

RSA 162-H:2, XI directs the Committee to assert jurisdiction when it determines that a proposed energy facility "requires a certificate, consistent with the findings and purposes set forth in RSA 162-H:1". The purposes set forth in RSA 162-H:1 include promotion of "the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety." RSA 162-H:1. The findings set forth in RSA 162-H:1 include "that it is in the public interest to maintain a balance among

[1] Antrim's initial petition was signed by over 100 residents, but only 97 of the original signers of the Petition were registered voters. Antrim therefore supplemented its Petition by the addition of 3 registered voters on December 8, 2014 to meet the statutory minimum.

those potential significant impacts and benefits …; that undue delay in the construction of new energy facilities be avoided; that full and timely consideration of environmental consequences be provided; that all entities planning to construct facilities … provide full and complete disclosure to the public of such plans; and that … construction and operation of energy facilities is treated as a significant aspect of land-use planning in which all environmental, economic, and technical issues are resolved in an integrated fashion." RSA 162-H:1.

This Committee previously determined on August 10, 2011 that Antrim Wind, LLC's project requires a certificate because: "the Town of Antrim does not have an ordinance or any other rules or regulations specifically designed to address the construction and operation of the renewable energy facility";[2] because "the Project … would have to receive variances allowing the construction of the facility of this type and magnitude in the Antrim's Rural Conservation District";[3] and because "the present ordinances are not designed to address the issues raised by construction of a renewable energy facility of the scale proposed and, therefore, if applied, would not adequately address the issues of the impact of the renewable energy facility on the region in general and on the Town".[4] The Committee also found that due to lawsuits related to the project, "Committee jurisdiction is the superior option for the purpose of avoiding undue delay in the construction of needed facilities, providing for full and timely consideration of environmental consequences and assuring that all environmental, economic and technical issues are [resolved] in an integrated fashion."[5]

All of these factors remain present today. Four years later, despite public support for the project by a majority of Antrim residents, Antrim has been unable to adopt a wind ordinance.

---

[2] August 10, 2011 Order, Page 23.
[3] August 10, 2011 Order, Page 23.
[4] August 10, 2011 Order, Pages 23-24.
[5] August 10, 2011 Order, Page 26.

Review by Antrim's Planning Board under the current Zoning Ordinance is likely to require numerous waivers of site plan review requirements and variances from the terms of the Antrim Zoning Ordinance. The standard to be applied to the project is uncertain and multiple lawsuits would likely result whether the project were approved or denied, as occurred during the approval of the meteorological tower.

Review by the Committee is required if Antrim and New Hampshire are to realize the benefits of the project. If approved, Antrim Wind, LLC will pay approximately $324,000 in local property taxes, plus state utility taxes,[6] making it Antrim's largest tax payer by a substantial margin. Antrim Wind, LLC will thereby become the Town's largest source of funds for public education, maintenance of highways, welfare, and for all other municipal and school services. Antrim Wind, LLC will provide jobs, both directly and indirectly. It will permanently protect over 908 acres of privately owned lands to help preserve Antrim's rural character. It will help Antrim and the State meet their renewable energy goals of 25% by 2025 which are critical as the effects of climate change become more apparent. To accomplish these goals, Antrim Wind, LLC requires review by the Committee, consistent with the findings and purposes set forth in RSA 162:H:1.

II. THE COMMITTEE'S PRIOR DECISION

On April 25, 2013, this Committee denied a prior application by Antrim Wind, LLC. The Committee specifically found that its "decision is not a determination that a wind facility should never be constructed in the Town of Antrim or on the Tuttle Hill/Willard Mountain

[6] RSA 83-F.

ridgeline. The decision is based solely on the information provided regarding the specific Facility presented in this docket. A different facility may be adequately suited to the region."[7]

Both the Town and Antrim Wind, LLC moved for rehearing and sought to re-open the record to revise its project to address the concerns identified by the Committee. However, Counsel for the Public and others objected, arguing that the changes then-proposed were so different as to require *de novo* review in a new application. The Committee agreed, finding:

> "The Subcommittee finds that review of the new evidence submitted by the Applicant would require the re-review of the entire Application in light of the requirements set forth by RSA 162-H. [...] **Here, the Applicant seeks to introduce evidence which would materially change the original Application and would require extensive de novo review** as opposed to "a full consideration of the issues presented at the hearing."[8]

Antrim Wind, LLC (and the Town of Antrim) accepted the Committee's determination that the proposed changes would be subject to *de novo* review in a new application. Antrim Wind, LLC revised its project to continue to provide renewable energy benefits while reducing aesthetic impacts. The question in this proceeding is not whether the project meets the criteria for approval, but whether these changes are subject to review by the Committee; the very issue the Committee has already decided. The opponents in this proceeding oppose the project, and therefore the petition for jurisdiction. However, they present no evidence or reason why the Committee should reverse its prior decision which found that these changes would be subject to *de novo* review in a new application.[9]

---

[7] April 25, 2013 Decision, Page 70 of 71.
[8] September 10, 2013, Order on Pending Motions, 10-11 (emphasis added).
[9] *Id.*

III. MATERIAL CHANGES TO THE PROJECT

Antrim Wind, LLC proposes significant material changes to its project to reduce its visual impacts both at Willard Pond and other areas. The changes to the project include:

- Elimination Turbine 10 of the 10 turbines, a 10% reduction.
- Reduction of Turbine 9 by 45 feet to 446.2 feet (9% reduction).
- Change to Siemen turbines with a reduced nacelle (33.02 feet vs. 40.82 feet) (19%) and reduced acoustic impacts, below the levels previously approved.
- Reduced tower width to 13 feet at the base (13% narrower).
- Permanent protection of an additional 100 acres of conservation lands on the ridge lines (12.4%) for a total of over 908 acres.

Many of these changes merit consideration by the Committee even if presented alone. However, the combined effect of all of these changes is a substantial reduction in the aesthetic impacts which concerned the Committee. As explained in the testimony presented by David Raphael:

- "**The area with potential visibility of the project within the 10-mile radius has been reduced by 12%**. The change in context and nature of view is more dramatic, particularly in sensitive areas such as Willard Pond."[10]
- "Turbine 10, the closest (1.33 miles away) and most dominant … **has been removed**."[11]
- "Turbine 9's height has been reduced so much so that **the hub now sits below the treeline, virtually eliminating its visual presence at these locations**."[12]

[10] David Raphael Testimony, Page 4 (emphasis added).
[11] David Raphael Testimony, Page 4 (emphasis added).
[12] David Raphael Testimony, Page 4 (emphasis added).

- "There will also **no longer be visibility from Center Pond in Stoddard, Spoonwood Pond in Nelson, or Nubanusit Lake in Hancock** with the removal of turbine 10 and the reduction in height of turbine 9."[13]
- "In fact, **visibility in the lower west quadrant of the 10-mile radius has been essentially eliminated with these changes in layout**. This means locations of higher scenic significance that are found here, such as Dublin Lake or Beech Hill, **will have no visibility of the project.**"[14]

Antrim and Antrim Wind, LLC are confident that these changes materially reduce the aesthetic impacts that concerned the Committee. However, the question before the Committee is not whether or not these changes should be approved, but whether they are sufficiently material so as to be entitled to review *de novo*, the very issue decided by the Committee in its September 10, 2013 Order.[15]

IV. THE *FISHER v. DOVER* RULE APPLIES

New Hampshire follows the "*Fisher v. Dover*" rule, named after the case of *Fisher v. Dover*, 120 N.H. 187 (1980) in which an applicant filed a "second application for a variance which ... was substantially the same as the variance previously requested and ultimately denied by the board." *Id.*, at 188. In considering the second application, the Board made "no comparison" to the prior application because it determined that "it doesn't matter whether the project materially differs or not". *Id.*, at 190. The Supreme Court held that "the board committed an error of law when it approved [the] second application for a variance without first finding either that a material change of circumstances affecting the merits of the application had

[13] David Raphael Testimony, Page 5 (emphasis added).
[14] David Raphael Testimony, Page 5 (emphasis added).
[15] Order on Pending Motions, Pages 10-11.

occurred or that the second application was for a use that materially differed in nature and degree from the use previously applied for and denied by the board." *Id.*, at 191.

In the three decades since the *Fisher v. Dover* decision, the Supreme Court has repeatedly held that when an application is revised "in response to comments made by [an agency] in denying the prior application" it is "therefore not "substantially the same application."". *Appeal of Town of Nottingham*, 153 N.H. 539, 566 (2006); *Morgenstern v. Rye*, 147 N.H. 558, 566 (2002) ("the plaintiff did not merely resubmit substantially the same application ... but, at the town's invitation, submitted a new proposal in an effort to meet the town's concerns."); *Hill-Grant Living Trust v. Kearsarge Lighting Precinct*, 159 N.H. 529, 536 (2009) ("it is logical to presume that if the [Board] invites submission of a subsequent application modified to meet its concerns, it would find an application so modified to be materially different from its predecessor"); *Appeal of Parkland Med. Ctr.*, 158 N.H. 67, 72 (2008) (change to sale-lease form of ownership was a "material change in circumstances"); *Brandt Dev. Co. v. City of Somersworth*, 162 N.H. 553, 559 (2011) (change in the law "constitute[s] a material change in circumstances").

Antrim Wind, LLC's changes to its project are precisely those that the Supreme Court has found to be material and entitled to review in a second application. In this case, the Committee "specifically invite[d] submission of a subsequent application modified to meet its concerns" (*Hill-Grant, supra*). Antrim Wind, LLC revised its application "in response to comments made by [an agency] in denying the prior application" (*Appeal of Town of Nottingham, supra*) which was "a new proposal in an effort to meet the [agency] concerns." (*Morgenstern v. Rye, supra).* Under these circumstances, the changes proposed by Antrim Wind, LLC are material and entitled to review under RSA 162-H:16, IV.

V. JUDICIAL ESTOPPEL PRECLUDES A FINDING THAT ANTRIM WIND'S PROJECT IS NOT SUBJECT TO *DE NOVO* REVIEW

The doctrine of judicial estoppel applies: "Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, [it] may not thereafter, simply because [its] interests have changed, assume the contrary position". *Kelleher v. Lumber*, 152 N.H. 813, 848 (2005) *citing New Hampshire v. Maine*, 532 U.S. 742 (2001). "The purpose of this doctrine is 'to protect the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Id.*

In this case, Counsel for the Public and other parties argued successfully and convinced the Committee that: "The denial of the Applicant's application does not preclude it from resubmitting a new application for a different project (provided it can establish jurisdiction)". *Objection of Counsel for the Public to Motion to Reopen the Record*, Pages 15-16 (June 13, 2013). The Committee understood Counsel for the Public's argument, which it described as: "the Applicant is simply attempting to re-litigate issues by requesting the reopening of the record *instead of filing a new Application*". Order of September 16, 2013, Page 10 (emphasis added). The Committee then found that: "Here, the Applicant seeks to introduce evidence which would *materially change* the original Application and *would require extensive de novo review*". Order of September 13, 2013, Page 11 (emphasis added).

Antrim Wind, LLC and the Town accepted and relied on the Committee's determination that the proposed changes to the project would be subject to review *de novo* in a new application under RSA 162-H:16, IV. Considerable time and resources have been spent to prepare an application to address the Committee's concerns. Under the doctrine of judicial estoppel, Counsel for the Public and other parties cannot change positions and now argue that these same

changes (with others now proposed in addition), are not material and subject to *de novo* review in a new application. *Cf. Cohoon v. IDM Software, Inc.*, 153 N.H. 1 (2005).

VI. ANTRIM CANNOT INVENT OR APPLY STANDARDS ON AN *AD HOC* BASIS

Intervenors who oppose Antrim Wind, LLC's project appear to advocate that, in lieu of review by the Committee under RSA 162-H, the Town could apply "reasonable" noise, wildlife, and aesthetic standards to the Antrim Wind, LLC project in the same manner as the Committee. *See*, RSA 162-H:16, IV (b) & (c). This view is incorrect because: (1) the Committee has specific legal authority to determine whether impacts are reasonable or unreasonable under RSA 162-H:16, IV; and (2) the Town's authority to regulate the project is limited to the standards in its Zoning Ordinance and Site Plan regulations.

RSA 674:16 authorizes Towns to adopt Zoning Ordinances. It states:

> **674:16 Grant of Power. –**
> I. For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5. **The zoning ordinance shall be designed to regulate and restrict**:
> (a) The height, number of stories and size of buildings and other structures;
> (b) Lot sizes, the percentage of a lot that may be occupied, and the size of yards, courts and other open spaces;
> (c) The density of population in the municipality; and
> (d) The location and use of buildings, structures and land used for business, industrial, residential, or other purposes.

RSA 674:16 is mandatory. If a municipality desires to regulate matters such as the height of "buildings and other structures" or the land to be "used for business, industrial, residential, or other purposes" – it must do so within its Zoning Ordinance. Similarly, RSA 674:17 imposes an obligation on Towns to establish standards in the Town's Zoning Ordinance:

674:17 Purposes of Zoning Ordinances. –

I. Every zoning ordinance shall be adopted in accordance with the requirements of RSA 674:18. **Zoning ordinances shall be designed**:

(a) To lessen congestion in the streets;
(b) To secure safety from fires, panic and other dangers;
(c) To promote health and the general welfare;
(d) To provide adequate light and air;
(e) To prevent the overcrowding of land;
(f) To avoid undue concentration of population;
(g) To facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks, child day care;
(h) To assure proper use of natural resources and other public requirements;
(i) To encourage the preservation of agricultural lands and buildings and the agricultural operations described in RSA 21:34-a supporting the agricultural lands and buildings; and
(j) To encourage the installation and use of solar, wind, or other renewable energy systems and protect access to energy sources by the regulation of orientation of streets, lots, and buildings; establishment of maximum building height, minimum set back requirements, and limitations on type, height, and placement of vegetation; and encouragement of the use of solar skyspace easements under RSA 477. Zoning ordinances may establish buffer zones or additional districts which overlap existing districts and may further regulate the planting and trimming of vegetation on public and private property to protect access to renewable energy systems.

New Hampshire law does not permit a Planning Board to determine what projects or standards are reasonable or unreasonable and apply those standards on a case by case basis. The Committee alone has the power to determine whether or not a project has impacts that are reasonable or unreasonable. RSA 162-H:16, IV. By comparison, the Town's "power to zone property to promote the health, safety, and general welfare of the community is delegated to it by the State, and the municipality must, therefore, exercise this power in conformance with the enabling legislation." *Britton v. Chester*, 134 N.H. 434, 441 (N.H. 1991); *see also Eddy Plaza Assocs. v. Concord*, 122 N.H. 416, 420 (1982) ("the Concord Planning Board cannot continue to exercise site-plan review authority over large-scale developments until it adopts specific regulations...."); *Lemm Dev. Corp. v. Bartlett*, 133 N.H. 618, 622-623 (1990) ("...the planning

board's subdivision regulations do not allow it to exercise the kind of control it would apparently like to have over Lemm's condominium development. To have this kind of control, the planning board must promulgate site plan review regulations."); *Smith v. Wolfeboro*, 136 N.H. 337, 344 (N.H. 1992) ("the board may not deny subdivision approval on an *ad hoc* basis because of vague concerns."); *Derry Senior Dev., LLC v. Derry*, 157 N.H. 441, 447-448 (2008) ("the local planning board must adopt specific site review regulations before exercising authority.").

Despite repeated efforts, Antrim has no standards that are intended to apply to a project such as the Antrim Wind, LLC's project. If Antrim attempted to apply "reasonable" or other standards to the project on a case by case basis, there is every reason to believe that its decisions and the project would be tied up in the Courts. Review by the Committee is therefore required to promote the findings and purposes set forth in RSA 162-H:1.

VII. CONCLUSION

For the reasons set forth herein, the Town of Antrim requests that the Committee determine that the Antrim Wind, LLC project require a certificate "consistent with the findings and purposes set forth in RSA 162-H:1."

Respectfully submitted,

Town of Antrim

By Its Counsel,

UPTON & HATFIELD, LLP

Date: June 26, 2015 By: _____

Justin C. Richardson
NHBA #12148
159 Middle Street
Portsmouth, New Hampshire 03801
(603) 436-7046
jrichardson@uptonhatfield.com

CERTIFICATION

I hereby certify that a copy of the foregoing Memorandum was this day forwarded to all parties in this proceeding by electronic mail.

_____
Justin C. Richardson